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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 1145

KALMAN GREENHILL and FRANK PROCTOR, *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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May 25, 1962.

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Kalman Greenhill and Frank Proctor pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on January 25, 1962.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, dated January 25, 1962, is reported in 298 F. 2d 405, and a copy is attached hereto as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on January 25, 1962, and a timely petition for rehearing was denied on March 27, 1962. On April 16, 1962, Mr. Justice Black signed an order extending the time for filing this petition for a writ of certiorari to and including May 25, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

The Court of Appeals granted an order staying execution of its decree to May 31, 1962, the stay to continue in force until final disposition of the case by this Court.

QUESTION PRESENTED

Whether a federal court conviction for fraud is consistent with that regularity and fairness which should characterize the administration of justice in the federal courts where (1) the trial is conducted in an atmosphere of hostility and prejudice, and (2) the inadequacies of proof and explanation of complex financial transactions involved in the prosecution make the jury verdict untrustworthy and subject to the influences of hostility and prejudice.

STATEMENT OF THE CASE

Petitioners were tried by jury in the United States District Court for the Northern District of Alabama and found guilty of nine counts of using the mails to defraud (18 U.S.C. § 1341) and of ten counts of fraud in the sale of securities by use of the mails (15 U.S.C. § 77q (a)(1)). Petitioner Greenhill was sentenced to three years imprisonment and petitioner Proctor to two years imprisonment. These convictions were af-

firmed on appeal to the United States Court of Appeals for the Fifth Circuit.

The gravamen of the offenses was alleged to be the wilful formation of a scheme to defraud certain persons named in the indictment by inducing them through false representations to renew subordinated debenture bonds or to buy short term notes issued by Alabama Acceptance Corporation.

The trial began on April 18, 1960, and concluded with the return of the jury's verdict on April 30, 1960. The record consists of 1,999 pages, with more than 300 exhibits. All of this was described by the Court of Appeals as "the mass of testimony, the multitudinous exhibits and the unusual length of the trial."

For present purposes, it is unnecessary to detail "the mass of testimony," it being sufficient to refer in that respect to the opinion of the Court of Appeals attached hereto. In its simplest terms, as the Court of Appeals noted, petitioners' alleged scheme to defraud was designed "to channel monies into their pockets from Alabama Acceptance Corporation . . . coupled with the false representations to investors in Alabama Acceptance Corporation, and the use of the mails."

John Murray in 1956 acquired control of Alabama Acceptance Corporation, an Alabama automobile finance company. Murray sought out petitioner Greenhill, a member of the New York bar for the past 37 years and a financial consultant in New York, and paid him a fee as a financial advisor. Murray submitted financial statements to Greenhill which indicated that Alabama was a solvent corporation. Greenhill suggested that Alabama undertake a program of

acquisition and merger of other companies. Greenhill offered his assistance in this program and that of his associate Frank Proctor, petitioner herein, an industrial engineer who graduated from the University of Pittsburgh. Proctor was to act as an industrial broker in finding and evaluating businesses for sale and Greenhill was to negotiate the terms, conditions and financing of the transactions. Neither Greenhill nor Proctor had ever been convicted of any crime.

As this relationship progressed, Greenhill and Proctor incorporated as a New York corporation, known as Frank Proctor & Associates, Inc. This corporation, together with the individual petitioners and other companies owned by petitioner Greenhill, entered into an agreement with Alabama Acceptance Corporation formalizing the acquisition and merger program. This contract was modified from time to time. In essence, it provided that Frank Proctor & Associates, Inc., was to assist Alabama—as financial consultant and in the management of the properties acquired through purchase. Compensation was established at $25,000 a year each for Murray and Proctor and $50,000 a year for Greenhill.

Pursuant to this program, Alabama acquired six corporations by purchase during 1956 and 1957. More than $1,000,000 was paid by Alabama for these subsidiaries. About 50 or 60 companies had been investigated by Proctor and about a dozen were seriously considered in this program.

In October, 1957, Greenhill began discussing with the owners of Cornucopia Gold Mines, Inc., the possibility of Alabama selling its subsidiaries to Cornucopia, in return for 2,000,000 shares of Cornucopia stock. Both Greenhill and Proctor insisted that this stock be registered. An agreement of sale to that effect was signed

and in November, 1957, Cornucopia took control of the subsidiaries. But Alabama never received the 2,000,000 shares of Cornucopia stock due it under this agreement. When Alabama went into bankruptcy in March of 1958 attempts were still being made to compel issuance of the Cornucopia Stock. Cornucopia itself went into bankruptcy in July of 1958, due to corporate losses and the defalcations of its president Earl Belle, and all of the subsidiaries which had been acquired by Alabama and sold to Cornucopia were taken back by their former owners to satisfy unpaid balances.

The foregoing transactions were alleged in the indictment to constitute a scheme on the part of Greenhill, Proctor, Murray and others to defraud the investors and creditors of Alabama Acceptance Corporation. The key to this plan was said to be profits to Frank Proctor & Associates, Inc., which were then paid out to petitioners Greenhill and Proctor in salaries, expense accounts and loans. The record shows, however, that Frank Proctor and Associates, Inc., actually lost money.

Newspaper advertisements and brochures mailed to prospective investors in Alabama Acceptance Corporation were alleged to have given a false picture of Alabama's financial condition and to have misrepresented its ability to pay high interest. Petitioners denied that they had engaged in any scheme to defraud and asserted that all losses suffered were the result of a *bona fide* bankruptcy and the actions of other creditors.

It was against this background that the trial proceeded, leading to a series of incidents depriving petitions of their right to a fair trial in a federal criminal proceeding.

REASONS FOR GRANTING THE WRIT

During the course of the proceedings in the District Court, a series of incidents occurred which, considered together, served to deprive petitioners of their right to that regularity and fairness which should characterize the administration of criminal justice in the federal courts. The probable cumulative effect of such incidents upon the jury was so great as to warrant review by this Court in terms of its power over the supervision of criminal justice in the federal courts. *Berger* v. *United States*, 295 U.S. 78; *Marshall* v. *United States*, 360 U.S. 310; *Saldana* v. *United States*, 365 U.S. 646.

The basic factors of unfairness permeating this case are twofold: prejudice against petitioners and incomplete and misleading presentation of complex facts.

A. Prejudice

1. Petitioners were tried in the Northern District of Alabama despite allegations, uncontradicted by the Government, that (a) a great amount of newspaper, radio and television publicity in the State of Alabama in connection with the collapse of Alabama Acceptance Corporation had been directed against petitioner Greenhill, a New Yorker, and (b) great hostility against petitioners had been engendered in that State by reason of the financial losses suffered by local citizens in the business failure of Alabama Acceptance Corporation. R. 56-63.

The District Court denied a motion filed under Rule 21(a) of the Federal Rules of Criminal Procedure to transfer the trial to the Southern District of New

York, based upon the foregoing considerations.[1] But the District Court did not contravene those considerations in denying the motion. And the Court of Appeals, in affirming such action, merely held that there was no showing of an abuse of discretion and no showing that on voir dire any adverse publicity had affected the ability of the jurors to reach and unprejudiced decision. The essential allegation that the trial was conducted in an atmosphere of great hostility remains unchallenged.

2. Throughout the trial and in the summation to the jury, efforts were made by Government counsel to portray petitioners as rich big-city operators from New York who had bilked helpless Alabama citizens of their life savings. Petitioners' geographic origins were emphasized and reiterated. The hostility which obviously existed in Alabama against these petitioners was adroitly exploited.

Thus extensive testimony was elicited as to the floor plans of petitioners' new offices on Madison Avenue in New York, with numerous references to the "very elaborate" nature of the offices and the inclusion of a kitchenette and bar. R. 516-520. Petitioner Greenhill was questioned at length about his stays at Miami Beach hotels. R. 1751-1754, 1776-1780. Such testimony, in a case presumably devoted to proof as to the

[1] The motion also alleged, under oath, that the petitioner Greenhill was insolvent and that it would be a great burden on him to secure the presence in Alabama of the necessary witnesses in New York. R. 62-63. Based on similar grounds, petitioner Greenhill moved to sever his trial from that of three Alabama defendants (Murray and two stock salesmen of Alabama Acceptance Corporation). That motion was denied. These three defendants, however, pleaded nolo contendre and received lesser sentences than those imposed on petitioners.

existence of a scheme to defraud, could only serve to prejudice a local Alabama jury against New York defendants.

Moreover, the selection of investor witnesses to testify at the trial reflected this general aura of hostility. One such witness produced by the Government had paid for his investment out of insurance proceeds received upon the death of his son (R. 1007, 1009); another witness, saved by the Government to the end of its case, was blind and needed his mother to read matters to him (R. 1163-1170); one investor witness was 78 years of age (R. 1016); another had paid for her note with a social security check (R. 931, 933); and still another had used cash savings to invest in Alabama Acceptance Corporation (R. 844, 853). While the Government obviously has virtually untrammeled choice in its selection of witnesses, in the circumstances of this case the choice it made clearly added to the sentiments of the jury and the hostile atmosphere in which petitioners were tried.

B. Presentation of Complex Facts

The evidence presented by the Government in this case, quite apart from any claim as to its legal insufficiency, involved such complex matters and was so clearly incomplete that the resulting verdict—if it is to be ascribed any basis—must be in large part grounded in the prejudice and hostility surrounding the trial.

Most of the Government's evidence was of a financial nature, understandable only by accountants. Basic to the case was a tracing of multitudinous financial transactions, particularly those whereby the petitioners were alleged to have profited personally. More than

300 documents were introduced, received and viewed fleetingly by the jury during the two week trial. The very statement of the facts in the opinion of the Court of Appeals reveals the enormously complex nature of the Government's case.

Yet the Government's evidence, despite its possession of all relevant books and data, was woefully incomplete in its tracing of these financial matters. At the crux of that evidence was the testimony of Norman Williams, the bookkeeper of Alabama Acceptance Corporation. R. 405. The Court of Appeals conceded, however, that his testimony and the exhibit he prepared (Govt. Exhibit 62) were "substantially weakened if not destroyed by an accounting witness for appellants." But more significantly, Govt. Exhibit 62 and the other documentary evidence, as supplemented by oral testimony by Government witnesses, relate an appallingly incomplete story of the financial transactions involving the petitioners.

Indeed, petitioners' counsel below, in order to aid the Court of Appeals in understanding the Government's evidence, employed a firm of certified public accountants to analyze the record, and particularly Govt. Exhibit 62. After weeks of expert work, this firm submitted a report—which was tendered to the Court of Appeals as an appendix to petitioners' brief—which demonstrated the lack of any real proof from the complicated data that petitioners had, as Williams seemingly testified (R. 529, 543), "milked" Alabama Acceptance Corporation out of a half million dollars.[2]

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[2] Williams, referring to Govt. Exhibit 62, stated that out of $502,000 worth of checks drawn on Alabama Acceptance Corporation in connection with the acquisition or merger program only "four or five thousand dollars" worth came back to that corpora-

The Government made no effort to introduce Alabama Acceptance Corporation's books of original entry. Completely absent were the books and records of Alabama's subsidiaries, as well as any testimony with respect thereto. No records of Cornucopia Gold Mines, Inc., were brought in. And this despite the fact that all such books and records were in the custody of and available to the Government. It thus became impossible for any trustworthy judgment to be rendered as to whether undue amounts of money flowed from Alabama to its subsidiaries and then eventually into the pockets of the petitioners—as charged in the indictment.

Yet the jury, acting under pressure from the judge to complete the case so that he might start another case the following Monday (R. 1693), met for a brief hour or so on Saturday, April 30, and made a judgment that such money did in fact find its way into petitioners' accounts. R. 1930. In light of the record inadequacies, such a judgment could not have been the result of intelligent discussion and deliberation by the jurors, who obviously lacked the qualifications of expert accountants.

The Court of Appeals sought to excuse the Government's inadequacies by stating that "All witnesses, facts, and records at the disposal of the government were presented or were available to appellants for their presentation" and that there is no basis for asserting that a law offender should go free "where

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tion from its subsidiaries. R. 543. The impression was left that the remainder of nearly $500,000 went to petitioners and their cohorts. Yet a detailed analysis of Govt. Exhibit 62, in light of other record evidence, shows that only about $68,000 was traceable to petitioners, an amount clearly justified in terms of services rendered.

there is danger from the complexity of the facts of a jury being unable to understand the case." A serious question is raised by such a holding as to whether it is the defendant's burden to call witnesses available to the Government to supply vital portions of the prosecution's case, and as to whether the stigma of guilt should fall on the defendant if the jury is unable to understand the case by reason of the insufficiencies in the prosecution's case. If the answers be those given by the Court of Appeals, then a crisis is indeed presented in the administration of criminal justice in the federal courts. Up until now, it has always been "for the prosecution to make out its case." *Rearick* v. *Pennsylvania*, 203 U.S. 507, 511 (Holmes, J.).

The state of this record—i.e., the inadequacies and lack of proper explanation with respect to complex financial transactions—was such as to leave the jury ripe for the undue influences and hostilities which surrounded this case from the start. The adverse atmosphere precluded a fair trial of such incomplete and complicated matters. As in *Kotteakos* v. *United States*, 328 U.S. 750, 765, "one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error."

This Court has long insisted that federal criminal trials be free of such taints as infected this case. It has demanded that where errors of this nature may have crept into a case the matter be examined in "the proper setting". *Bollenbach* v. *United States*, 326 U.S. 607, 611. Where there have been appeals to sectional or local prejudices and where an atmosphere of hostility toward the defendant has been established, condemnation has been quickly forthcoming. See *New York Central R. Co.* v. *Johnson*, 279 U.S. 310, 319. And where the prosecutor has overreached himself, as

he may well have done here in the presentation of the inadequate proof, in the exploitation of hostility and in his summation to the jury, the error cannot be overlooked. *Berger* v. *United States*, 295 U.S. 78, 89; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239-240. Such are the principles to be applied to this case.

CONCLUSION

Here, as in *Saldana* v. *United States*, 365 U.S. 646, 647, the "combination of circumstances" makes the result "not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts." That is true even though each circumstance, viewed separately and distinct from the total setting, might be insufficient to warrant review or reversal.

For these various reasons this petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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May 25, 1962.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18439

KALMAN GREENHILL, FRANK PROCTOR, JR.,
a/k/a FRANCIS E. PROCTOR, *Appellants*,

v.

UNITED STATES OF AMERICA, *Appellee*.

Appeal From the United States District Court for the Northern District of Alabama.

(January 25, 1962)

Before RIVES, CAMERON, and BELL, Circuit Judges.

BELL, Circuit Judge: This consolidated appeal comes to us on a record of 1,999 pages together with more than 300 exhibits. It is from final judgments and sentences imposed upon a jury verdict finding appellants guilty on nine counts of using the mail to defraud[1] and ten counts of fraud in the sale of securities by the use of the mails[2] in that they willfully devised a scheme to defraud certain persons named in the indictment by inducing them through false representations to buy subordinated debenture bonds or short term notes issued by Alabama Acceptance Corporation. Appellant Greenhill was sentenced to three years and Appellant Proctor to two years in the Federal Penitentiary.

Despite the mass of testimony, the multitudinous exhibits and the unusual length of the trial, this story can be

[1] Title 18, USCA, § 1341 makes it a crime to use the mails in furtherance of a scheme to defraud or to obtain money or property by means of false or fraudulent representations.

[2] Title 15, USCA, § 77g(a)(1) makes it unlawful, and subject to the penalties set out in Title 15, USCA § 77x, in the sale of securities by the use of the mails to employ any device, scheme or artifice to defraud.

simply told. In March of 1956, John Murray, who was jointly indicted with appellants and who entered a plea of nolo contendre on the day trial commenced,[3] acquired control of Alabama Acceptance Corporation, an Alabama corporation with its principal place of business in Birmingham by buying for $12,500 in notes all of the outstanding stock of Beech Investment Company, Inc., an Alabama corporation which owned fifty one percent of its capital stock. Murray became chief executive officer of Alabama Acceptance, an automobile finance company which was losing money when he bought it.[4]

John Murray was advised by Milton Linn of Miami, Florida to get in touch with Appellant Greenhill, a New York attorney but more recently doing financial consulting, about the financial problems of Alabama Acceptance Corporation. Murray made an appointment to see Greenhill at his two room office located at 1407 Broadway in New York on the condition that he pay Greenhill a retainer fee of $1,000. Greenhill later borrowed $5,500 from Alabama Acceptance Corporation to pay Mr. Linn as a brokerage fee for referring Murray to him. At any rate, upon payment of the $1,000 retainer fee Greenhill conferred with Murray and his accountant Williams for some hours, advising that he could not help them in the automobile financing business

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[3] Carl K. Welles and William Edward Faulk, securities salesmen for Alabama Acceptance Corporation were also jointly indicted and entered pleas at the same time.

[4] Defendant's Exhibit 141, an audit report, showed losses for the eight months' period ending February 29, 1956 of $44,904.53 and losses for the month of February alone of $11,680.94. The earned surplus as of June 30, 1955 was $52,823.02 but the losses together with dividends paid on common and preferred stock had reduced the earned surplus as of February 29, 1956 to $68.85. This statement showed capital funds of $97,375.00 in six and eight percent ten year subordinated debentures, $162,81 in preferred stock and $1.00 in common stock which together with earned surplus made a total of $260,254.85.

but suggested that Alabama Acceptance Corporation undertake a program of acquisition of other companies. Greenhill offered his assistance in such a program and that of his associate, Appellant Proctor, an engineer whose experience had been mainly in sales; Proctor to act as an industrial broker in finding and evaluating business for sale and Greenhill to negotiate the terms, conditions and financing of the transactions.

Here it should be noted that Greenhill and Proctor had for some months been associated under the style of Frank Proctor & Associates as industrial brokers. Their motivation was to earn finders fees by putting those who wanted to sell in touch with those who wished to purchase with negotiation then to be done by the would-be sellers and purchasers. In short, they knew of industries for sale and could find others and Alabama Acceptance Corporation was to become a captive purchaser.

Proctor occupied the extra office in the suite of Greenhill and he also met for a short time with Murray and Williams. This was on or about June 19, 1956. A few days later Mr. Greenhill met with John Murray in Birmingham to discuss the matter further. The long and the short of this meeting was that it was agreed that Greenhill and Proctor would undertake an acquisition program for Alabama Acceptance on conditions to be agreed upon. Greenhill while in Birmingham on this trip borrowed $3,000 from Alabama Acceptance Corporation.

In July 1956 Greenhill and Proctor chartered Frank Proctor & Associates, a New York corporation. Greenhill was never an officer of Alabama Acceptance, Frank Proctor & Associates or any of the other related corporations. Proctor was president of Associates and became a director of Alabama Acceptance. Greenhill stated to Murray at the first meeting in New York that he could not occupy any foreground position in any undertaking because of, among other reasons, his tax difficulties and previous bankruptcy.

Murray, Proctor, and Greenhill as individuals, Roland Industries, Inc., a corporation owned by Mr. and Mrs. Greenhill, and Frank Proctor & Associates entered into an agreement during the same month to the effect that Alabama Acceptance Corporation would enter into an acquisition program whereunder companies would be submitted to it for purchase by Greenhill, Proctor, Roland Industries, and Associates which program was to last for three years. A commission equal to five percent of the purchase price was to be paid to the person or firm submitting the proposal at the time title to the stock being purchased passed to Alabama Acceptance Corporation. Thereafter this agreement was modified to the extent that Alabama Acceptance engaged the services of Frank Proctor & Associates as financial and management consultants in connection with the corporations and properties acquired and to be acquired and agreed to pay Associates for these services a sum equal to five percent of the total purchase price plus $100 per week from each subsidiary which it controlled, plus a sum equal to twenty five percent of net profits of Alabama Acceptance before taxes. Then in 1957 but retroactive to June 18, 1956, Murray, Proctor, and Greenhill entered into an agreement in which it was recited that Beech Investment Company owned control of Alabama Acceptance Corporation and that Murray owned fifty one percent of the stock of Beech and that Frank Proctor & Associates had an agreement to purchase the remaining outstanding forty nine percent of the stock of Beech and that they had formed various other corporations since June 18, 1956 and others would be formed in the future. They then agreed that with the exception of Alabama Acceptance and Beech the three of them would own one third each of every other corporation organized including Frank Proctor & Associates, Inc., a New York corporation; Frank Proctor & Associates, Inc., a Florida corporation; Alabama Capital Corporation, a New York Corporation; Central Capital Corporation, a Florida corporation; and Allen Capital Corporation, a New

York corporation. They agreed also that in regard of these holdings and all future holdings all increments, dividends, additional issues or incomes, or income or property received by any of the companies or by either of the parties as commissions or broker fees or any other compensation would be divided equally amongst the three, and all of this was to be true notwithstanding the manner in which the holdings might be reflected on the records of any of the companies. Lastly, in this agreement it was specified that each would be employed for a period of ten years from June 18, 1956 to devote full time and attention to the interest of all companies covered in the agreement with Murray and Proctor to receive $25,000 per year and Greenhill to receive $50,000.

Appellants, in cooperation with Murray, then set out on an acquisition program. The pattern of acquisition was a small down payment and a large mortgage whether acquiring stock or assets, with emphasis on assets, and with little or no regard being given to the profit record of the companies being acquired. Only one subsidiary prospered. Companies were acquired publishing small newspapers, operating printing plants, and manufacturing water heaters, radar parts, and parts for aircraft and missiles as well as electric fans. Many companies were investigated and not purchased and in three instances options were purchased but final acquisition did not take place. In one of these Frank Proctor & Associates collected a fee of $25,000 which was never repaid to Alabama Acceptance although the refund was carried on the books of Alabama Acceptance as an account receivable.

The key to the arrangement or plan contrived by appellants and Murray was profits to Frank Proctor & Associates which was in turn paid out to appellants in salaries, expense accounts, and loans. These came through the medium of the agreed finders or brokerage and management fees. The contract as to management fees was dis-

regarded. For example, one subsidiary was paying Associates on the basis of $15,000 per annum.

In the fiscal year ending June 30, 1957, Associates had an income of approximately $96,000, virtually all of which came from Alabama Acceptance in connection with the acquisition program. Proctor was paid $24,500 and Greenhill $53,000 in salary out of Associates for this period. This did not include loans to Greenhill from Alabama Acceptance or Associates. Loans also were necessarily made to Associates so that salaries and expenses could be paid as Associates, according to its federal income tax returns had liabilities exceeding assets by more than $30,000 as of the end of the fiscal year. The capital account was only $1,500 and losses were over $30,000. Greenhill was not an officer of Associates but was working under the salary agreement with Murray and Proctor. Proctor was President of Associates.

Greenhill and Proctor prospered to the extent that they moved out of the small offices on Broadway to Madison Avenue where they occupied a spacious suite complete with reception room and conference room. Greenhill was spending a substantial amount of time at the Eden Roc and Americana Hotels at Miami Beach, Florida with Alabama Acceptance and Associates each reimbursing him for forty percent of his expenses. His purpose in being there was to make contacts and on one occasion reported that he had obtained a $25,000 line of credit for one of the subsidiaries through one of his contacts there. He was also supervising the sale of securities in that area.

Alabama Acceptance Corporation and all of its subsidiaries were dominated by Murray, Proctor, and Greenhill during this period of the acquisition program insofar as the program and the financing was concerned. Funds were needed to keep the program going and plans and efforts were intensified to sell long term debentures and short term notes to the investing public. Murray and Proctor

were concentrating on Alabama while Greenhill was lending his efforts to the Miami area. Welles was the Sales Manager in Alabama under Murray and Proctor while Faulk was in charge of sales under Greenhill in the Miami area. Alabama Acceptance Corporation, even before it was acquired by Murray had engaged in selling long term debentures to the public. Among their sales pitches was a representation made in person, through the mail and by way of newspaper advertisements to prospective investors and investors being asked to reinvest that the corporation could afford to pay high interest because it was an income tax deduction. The following is a quote from a standard newspaper advertisement:

> "HOW . . .
> "Alabama Acceptance Corp.
> "Can Pay 7% Interest
> "Interest is a cost of doing business. Our income taxes are 52%, and, therefore, Uncle Sam absorbs more than half of our interest cost. Our net interest costs, therefore, approximately 3.8%."

This representation was continuously made although Alabama Acceptance Corporation paid no federal income tax whatever because of no earnings during the entire period in question here. Its only association with income taxes was to receive refunds on account of losses.

Another pitch was through the medium of a pamphlet entitled "Alabama Acceptance Corporation—A Story of Interest," a brochure which was the basic literature of the company directed to prospective investors and which was prepared by an advertising man under the direct supervision of Greenhill and Proctor. "Financial Highlights" in this brochure were stated as of January 1, 1957 to be "working capital in excess of $800,000 and net worth in excess of $600,000". As of June 30, 1957, working capital was stated in this brochure to be $1,850,000, and net worth

to be in excess of $760,000. Though not so stated the fair implication was that these figures reflected consolidated figures of Alabama Acceptance and all subsidiaries. No breakdown or detail on these totals was given.

Balance sheets furnished to the State Securities Commission of Alabama told a wholly different story. The figures as of January 1, 1957, rounded off in the style of Greenhill and Proctor, did show working capital, by including capital stock, surplus, the reserve for unearned discount, and the total of the subordinated debentures to be in excess of $800,000, but this included surplus based on a write up of fixed assets purchased under the acquisition program of over $464,000. The net worth was a little less than $600,000 but this also included the write up of fixed assets. The earned surplus had shrunk to a deficit of over $51,000. No investor could possibly know the true status of working capital or net worth from the brochure.

The balance sheet furnished the state for the quarter ending June 30, 1957, showed a startling discrepancy when compared with the figures represented in the brochure to be the "Financial Highlights" as of that date. Instead of working capital being in excess of $1,850,000 as represented, it was a little less than $800,000 including a figure of $166,271.29 entitled "minority interest in subsidiaries", and net worth instead of being $760,000 as represented was a little less than $400,000. The write up of the surplus from fixed assets had decreased from $464,000 to $222,000 because sales of properties were inexorably setting the real value. Incidentally, these statements furnished to the State Commission were put in evidence by appellants.

As of September 30, 1957, Alabama Acceptance Corporation filed a statement with the State Securities Commission showing a balance sheet on Alabama Acceptance Corporation only with no subsidiaries included. This statement showed as assets all sums invested in actually acquiring subsidiaries and for options to purchase which expired.

This statement showed a deficit in earned surplus of $345,494.92 making a deficit in net worth of $182,683.92. It will be recalled that the earned surplus of the company on February 29, 1956, a few days before Murray acquired it and a few months before the start of the acquisition program, was $68.85 and the net worth of the company exclusive of subordinated debt was at that time $162,879.85. The end was near but sales of debentures and notes to investors continued.

Greenhill in the meantime had become acquainted with the principals in Eastern Investment and Development Company and had acted as broker in their purchase of a controlling interest in Cornucopia Gold Mines, a company with approximately 4,000,000 shares of stock outstanding and listed on the American Stock Exchange. This purchase was of 1,000,000 shares at twenty five cents per share. The sales price during the latter part of 1957 ranged from a price of twenty five cents to thirty seven and one half cents per share. This company, according to a report filed with the Securities and Exchange Commission and in evidence had during the six months period ending June 30, 1957 an income of $1,774.07 and a net loss of $14,378.93. Its current assets consisted of $1,415 in cash and accounts receivable, and it had certain gold mining and uranium properties either acquired for cash or stock.

Greenhill worked out an arrangement with the principals of Eastern Investment whereby the four subsidiary properties of Alabama Acceptance Corporation remaining after previous sales would be sold to Cornucopia in exchange for two million shares of Cornucopia's stock to be issued which stock would be placed in a voting trust for ten years, with the two million shares to be divided in a manner to be later determined by and between Greenhill, Proctor, Frank Proctor & Associates and Alabama Acceptance Corporation. Greenhill advised in a letter to Accountant Williams

who was seeking information for an audit that Alabama Acceptance would receive "upwards of 1,000,000 shares" and that Greenhill and Proctor would subordinate to debenture holders and creditors any Cornucopia stock to be received and owned by them. The record is silent as to how they would acquire their stock, the consideration for which was to be the subsidiaries of Alabama Acceptance Corporation. The agreement was subject to confirmation by the Cornucopia stockholders and the approval of the Securities and Exchange Commission, only a matter of form to Greenhill. The agreement was never confirmed nor approved and no stock was ever issued to Alabama Acceptance under the agreement.

In the meantime Cornucopia, with the consent of Alabama Acceptance and the holders of mortgages to secure the unpaid balances due on the subsidiaries took possession of the subsidiaries. Each subsidiary had been foreclosed by the original owners or was in receivership at the time of the trial, and both Cornucopia and Alabama Acceptance Corporation were in bankruptcy.

In addition to the debentures and unsecured notes being sold by Alabama Acceptance Corporation, notes were also being sold, secured by stock in one of the subsidiaries, or by automobile receivables. After the Cornucopia agreement, secured notes were sold on the representation that Cornucopia Gold Mine Stock was being held in trust to secure the loan represented by the note despite the fact that no Cornucopia stock whatever was ever received by Alabama Acceptance Corporation.

When the end came to this profitless and undercapitalized corporate structure, conceived as it was by appellants, the liabilities of Alabama Acceptance were over $1,000,000 while assets were less than $100,000. Between May, 1958 and the time of the trial, April 1960, the trustee had collected only $25,600.

This was the evidence before the court and jury. The jury might well have believed that appellants, with Greenhill dominating the operation but ably assisted by Proctor, set up a scheme, simple though it was, to channel monies into their pockets from Alabama Acceptance Corporation, and that the scheme was effectuated. This, coupled with the false representations to investors in Alabama Acceptance Corporation, and the use of the mails would be an adequate basis for verdicts of conviction. At any rate the proof together with the allowable inferences was entirely sufficient and the court did not err in overruling the motions for judgment of acquittal. *Hargrove* v. *U. S.*, 5 Cir., 144, 139 F. 2d 1014 and *Riggs* v. *U. S.*, 5 Cir., 1960, 280 F. 2d 949.

As to other errors assigned, we have carefully reviewed this record and conclude that appellants had their day in court. They were fairly tried. They were ably represented on the trial. All witnesses, facts, and records at the disposal of the government were presented or were available to appellants for their presentation. There is no reasonable basis for the claim that the prosecutor was too vigorous within the rule of *Berger* v. *United States*, 1935, 295 U. S. 78, 55 S. Ct. 629, 79 L. Ed. 1314. The government was as entitled to an advocate as appellants.

The fact that the government used, without objection based on prejudice, as five out of some twenty investor witnesses one who was blind, and others who were peculiarly objects of sympathy did not deprive appellants of due process of a fair trial. Appellants and not the government made them investors and prospective witnesses.

Appellants whose counsel on appeal did not participate in the trial of the case contend that due process under the Fifth Amendment was lacking because the evidence was so complex and incomplete that the jury could not understand it without either expert interpretation or the complete records. They urge the fact that the jury returned a ver-

dict in approximately one hour as supporting the proposition that the verdict was based on either prejudice or the alleged erroneous testimony of Witness Williams, hereinafter discussed. We have set out the salient facts in some detail here to demonstrate that the evidence was not unusually complex nor was it incomplete. The exhibits were explained to the jury during the progress of the trial. It would not have been unusual for the jury to reach a verdict in an hour on the record here. We reject the unsupported theory of appellants that a law offender, being entitled to a jury trial, should go free where there is danger from the complexity of facts of a jury being unable to understand the case, appellants contending that society and not the offender in such event should suffer.

Appellants testified and now strongly contend that they had no intent to defraud. Their testimony was, and others so testified, that the acquisitions made were to the benefit of Alabama Acceptance, and that they were only attempting to help a company that was operating at a loss. The law is that honest belief in the ultimate success of the venture will not justify false representations in the sale of securities. *Danser* v. *United States*, 1 Cir., 1960, 281 F. 2d 492; *Linn* v. *United States*, 2 Cir., 1916, 234 Fed. 543; *Proffer* v. *United States*, 5 Cir., 1961, 288 F. 2d 182; *United States* v. *Crosby*, 2 Cir., 1961, 294 F. 2d 928; and *Foshay* v. *United States*, 8 Cir., 1933, 68 F. 2d 205, cert. den., 291 U. S. 674, 54 S. Ct. 418, 78 L. Ed. 1063.

Appellants also assigned as error the failure of the court to grant a motion to transfer the case under Rule 21 (a), F. R. Cr. P., to the Southern District of New York because of undue prejudice resulting from wide spread publicity in the Birmingham area. The decision of the trial court on such a motion will be affirmed where as here no abuse of discretion is shown, and lack of abuse of discretion is buttressed where as here there was no showing in the course of the voir dire examination that any adverse publicity had

effected the ability of the jurors to reach and unprejudiced decision. *Kott* v. *United States*, 5 Cir., 1947, 163 F. 2d 984, cert. den., 333 U. S. 837, 68 S. Ct. 607, 92 L. Ed. 1121; *Mayo* v. *Blackburn*, 5 Cir., 1958, 250 F. 2d 645, cert. den., 356 U. S. 938, 78 S. Ct. 779, 2 L. Ed. 2d 812; and *United States* v. *Moran*, 2 Cir., 1956, 236 F. 2d 361; cert. den., 352 U. S. 909, 77 S. Ct. 146, 1 L. Ed. 2d 117.

Appellants assert that the case of the government is based principally upon the testimony of Witness Williams, former auditor for Alabama Acceptance Corporation and that his testimony was contradicted by exhibits introduced by the government, but of course this is only a matter of weight and for the jury. They urge that the government's Exhibit 62 which was a compilation by Williams of the checks written by Alabama Acceptance to Proctor or to Greenhill or to Frank Proctor & Associates was unduly prejudicial in that it gave the jury the impression that large sums were improperly taken. They also urged on the trial and before this court that this exhibit was not admissible because it was a summary and only the original records would be admissible. The rule is that such a summary of books is admissible, provided cross-examination be allowed and the original records are available. *Cooper* v. *United States*, 5 Cir., 1937, 91 F. 2d 195 and *Kolbrenner* v. *United States*, 5 Cir., 1926, 11 F. 2d 754. The long and the short of these assertions is that the trial court postponed the trial to enable accounting witnesses for appellants to prepare their defense. All records were available to them. On the trial defense counsel objected to the exhibit in question because the checks were not available even though the original records, i.e., books of entry, were available. These checks were then presented to defense counsel on order of the court and some were used by the defense. Further, the testimony of Williams and the efficacy of this exhibit was substantially weakened if not destroyed by an accounting witness for appellants. There

was no error in the admission of the exhibit and the weight of it and the testimony of Williams was for the jury.

Having had a fair trial, the verdict being adequately supported, and the errors assigned being without validity, the judgments are

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Judgment

Extract from the Minutes of January 25, 1962

No. 18439

KALMAN GREENHILL, FRANK PROCTOR, JR.,

a/k/a FRANCIS E. PROCTOR,

v.

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed.